to the rule. One of these is that where a sale of goods is executory and with no inspection by the buyer there is an implied warranty, that the goods shall be merchantable. *Blackwood* v. *Cutting Packing Co.*, 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199; *Hood* v. *Bloch*, 29 W. Va. 244; *Fogel* v. *Brubaker*, 122 Pa. St. 7; *Chicago Pack. & Prov. Co.* v. *Tilton*, 87 Ill. 547; *Russell* v. *Critchfield*, 75 Ia. 69. The term, merchantable, as thus employed, does not imply that the goods shall measure up to any particular standard of fineness nor that they shall be of the best grade; but it means that the goods shall not be of a quality so inferior as that there shall be no average market for them among those who deal in the particular commodity. Or as it is sometimes expressed, "the article shall not have any remarkable defect." *McClung* v. *Kelley*, 21 Ia. 508; *Howard & Ryckman* v. *Hoey*, 23 Wend. (N. Y.) 350, 35 Am. Dec. 572. In the case under consideration, the court said: "'Ice' in the trade means 'merchantable ice.' Hence, whenever a contract of sale of ice is made, it is a contract of sale of merchantable ice, unless otherwise stipulated." The court cites, in support of its position, *Warner* v. *The Arctic Ice Co.*, 74 Me. 475, and *Morse* v. *Moore*, 83 Me. 473, 22 Atl. 362, 13 L. R. A. 224, 23 Am. St. Rep. 783. The court, while not basing its decision on the principle of an implied warranty of "sound quality from sound price," says: "The plaintiff was offered and accepted what it conceded to have been the price for merchantable ice." Apparently, the only state which has adopted the civil law rule, *caveat venditor*, is South Carolina. *Timrod* v. *Shoolbred*, 1 Bay (S. Car.) 324, 1 Am. Dec. 620; *Smith* v. *McCall*, 1 McCord (S. Car.) 143, 10 Am. Dec. 666; *Bulwinkle & Co.* v. *Cramer & Blohme*, 27 S. Car. 376, 3 S. E. 776, 13 Am. St. Rep. 645. If a general, indefinite term like "ice" is employed in an executory contract, it is proper that the jury be instructed that the word has a broader meaning than is expressed by its mere dictionary definition and means an article that is merchantable. There will be no performance of the contract if a merchantable article be not supplied. *Murchie* v. *Cornell*, 155 Mass. 60, 31 Am. St. Rep. 526, 29 N. E. 207, 14 L. R. A. 492; *Swett* v. *Shumway*, 102 Mass. 365, 3 Am. Rep. 471.

SALES—PASSING OF TITLE IN CROP TO BE GROWN.—Plaintiff agreed to loan to defendant a quantity of seed corn, and defendant, who had leased land, agreed to plant and to cultivate and to deliver the crop, when grown, to plaintiff. In case the crop to be grown should prove unmerchantable, plaintiff was to have the right to reject it. The contract also provided that all title in the seed and in the crop, when raised, should be in the plaintiff. Defendant was to receive a stipulated price for the grain provided it proved to be of a certain quality. After the corn had been gathered, defendant refused to deliver it to plaintiff. In an action of replevin to recover possession of the crop, *Held*, that the contract was executory and that, as the corn had not been tested and set apart for him, plaintiff had no title and could not recover. *Robinson* v. *Strickland* (1905), — Neb. —, 102 N. W. Rep. 479.

The nature of the property usually determines the question as to whether or not there can be a sale of it when it has, as yet, no existence. The

authorities, although differing somewhat in their application of the term, are agreed that there can be a sale of non-existing property if it be in potential existence, *e. g.*, the prospective increase of something of which the vendor is the present owner. *Dickey* v. *Waldo*, 97 Mich. 255, 23 L. R. A. 449; *Sanborn* v. *Benedict*, 78 Ill. 309; *Cutting Packing Co.* v. *Packers' Exch.*, 86 Cal. 574, 21 Am. St. R. 63, 25 Pac. 52; *Hull* v. *Hull*, 48 Conn. 250, 40 Am. Rep. 165. As to crops not yet planted, some courts hold to the view that there can be no valid executed sale. *Welter* v. *Hill*, 65 Minn. 273, 68 N. W. 26; *Redd* v. *Williams*, 58 Ga. 574. But in *Briggs* v. *United States*, 143 U. S. 346, 12 Sup. Ct. Rep. 391, it was held that there could be a valid sale of a crop of cotton not yet planted,—the court saying, that "the sale would take effect the moment the crop appeared." The plaintiff, in the case under consideration, attempted to show that the title to the prospective crop was in himself and that defendant was to be paid for his work of raising the corn. But the court pointed out the fact that only that portion of the crop which should conform to a standard agreed upon, in the contract, was to go to the plaintiff and that, therefore, the sale was one of a part of a larger mass, which part had not yet been separated from the mass. That being so, the title of plaintiff had never become complete. As to whether there can be a valid mortgage of a crop not yet existing, there is a conflict of authority. In the following cases, such a mortgage has been held to be valid. *Headrick* v. *Brattain*, 63 Ind. 438; *Rawlings* v. *Hunt*, 90 N. C. 270; *Arques* v. *Wasson*, 51 Cal. 620, 21 Am. Rep. 718. To the contrary see, *Bates* v. *Smith*, 83 Mich. 347; *Comstock* v. *Scales*, 7 Wis. 138; *Hutchinson* v. *Ford*, 9 Bush. (Ky.) 318, 15 Am. Rep. 711; *Cressey* v. *Sabre*, 17 Hun. (N. Y.) 120. But in some states, although there can be no valid sale or mortgage of a crop to be planted, it is held that such a conveyance creates an equitable interest which will attach to the property upon its coming into existence. *Hurst* v. *Bell*, 72 Ala. 336; *Everman* v. *Robb*, 52 Miss. 653, 24 Am. Rep. 682; *Wilkinson* v. *Ketler*, 69 Ala. 435; *Butt* v. *Ellett*, 19 Wall. 544.

TORT: LIABILITY OF MANUFACTURER ON SALE OF INFERIOR OIL.—Plaintiff sustained injuries from explosion of a lamp filled with oil manufactured by defendant and the explosion of which was alleged to have been due to adulteration or inferior grade of oil. *Held*, the manufacturer or wholesaler of kerosene inferior to the test required by statute is liable for resulting damages to a consumer. *Stowell* v. *Standard Oil Co.* (1905), — Mich. —, 102 N. W. Rep. 227.

Defendant contended that there being no privity of contract between plaintiff and defendant, no recovery could be had in the absence of a showing that defendant had actual knowledge of the inferior quality of the oil or had reason to know of it. It was manifest that the oil inspector was extremely lax in his methods and his inspection fell far short of compliance with the statute. The state legislature having recognized oil inferior to the test as a dangerous substance, the case does not come within the exception to the general rule, as laid down in *O'Neill* v. *James* (1904), — Mich. —, 101 N. W. 828, noted in 3 MICHIGAN LAW REVIEW, 420.